SAW SEE KEAN & ANOR A

v.

PP

HIGH COURT MALAYA, ALOR SETAR B
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 42-19-2005]
30 MARCH 2010

CRIMINAL LAW: *Firearms (Increased Penalties) Act 1971 - Section 4 - Exhibiting firearm while committing scheduled offence - Proof - Whether appellant positively identified by witness - Whether firearm was equally positively identified - Whether conviction proper and justified - Firearms (Increased Penalties) Act 1971 s. 4 - Penal Code s. 34* C

EVIDENCE: *Confession - Admissibility - Exhibiting firearm while committing scheduled offence - Phrase "pistol yang saya pakai dalam samun di Kerpan" in confession - Whether did not relate to discovery of pistol - Whether inadmissible - Evidence Act 1950 s. 27* D

The second appellant ('the appellant'), in the course of committing robbery at SP5's goldsmith shop, had trained a pistol ('P3') on SP5, and had on that score been charged with and convicted of an offence under s. 4 of the Firearms (Increased Penalties) Act 1971 ('FIPA'). It was not in dispute that in so convicting the appellant, and sentencing him to imprisonment for life and 10 strokes of whipping, the trial judge had considered SP5's evidence identifying the appellant as the person who had come to his goldsmith shop brandishing a pistol and threatening him on the day in question, as well as the appellant's confession made to ASP Saari ('SP19') that "pistol yang saya pakai dalam samun di Kerpan saya simpan di rumah abang saya di Flat, Tingkat 3, di Butterworth, plate kereta, baju hitam dan cermin mata saya buang di jalan menghala ke Changloon. Saya boleh tunjuk tempat pada Encik". It was the trial judge's view that the confession were not only related but had led to the discovery *inter alia* of P3 and several live ammunitions used in the robbery. Be that as it may, in this appeal against his conviction and sentence, the appellant argued that s. 27 of the Evidence Act 1950 is not applicable in this case, as SP19 knew beforehand about the location of P3, and that it was wrong of the trial judge to have admitted the appellant's confession. It was further contended that the conviction could not stand on account of the many loopholes in the prosecution's case, including those E F G H I

A that pertained to the identity of P3 (where SP1 said it was black in colour whilst SP5 said it was brown) and the failure to call as witness the lady who stayed with the first appellant in the flat from where P3 was recovered.

B **Held (dismissing appeal and affirming conviction and sentence):**

(1) The words "yang saya pakai dalam samun di Kerpan" in the confession do not relate to the discovery of the pistol in the drawer of the almeirah in the bedroom of the first appellant's flat in Butterworth, and therefore must stand inadmissible just C like the words "with which I stabbed A" in the *locus classicus* case of *Pulukuri Kottaya & Ors v. Emperor*. Hence, the evidence to fasten the pistol, P3, with the robbery must be sought elsewhere. However, in this case, the evidence of SP5 showed that he had positively identified P3 as the pistol used by the D appellant to threaten him and put him in fear of death in the course of the robbery at his shop. Thus, the main ingredient of the offence under s. 4 of FIPA had been proved. (para 36)

(2) Section 27 of the Evidence Act 1950 is applicable to this case and there was no detectable error in law and facts committed E by the trial judge in considering the section. On the facts, SP19 certainly did not know the exact location of the pistol, the magazine and the ammunitions. At best, he only knew that the firearm was used in the robbery at SP5's goldsmith shop which was reported *vide* Ayer Hitam Rpt. No. 742/99. Having only F had a cursory knowledge about the firearm and not its specific location, SP19, or for that matter other police personnel, could not be said to have had prior knowledge of the whereabouts of P3, P5 and P7 before their discovery. (paras 39 & 41)

G **(3)** The contentions on the alleged break in the identity of the pistol, the prosecution's failure to call the lady in the flat, and SP5's failure to mention the "Star" symbol on the pistol in his police report, had in no way weakened the prosecution's case. Consequently, the appellant's defence for an offence under s. 4 of FIPA was rightly called by the trial judge. (paras 47 & 48)

H **(4)** The trial judge had rightly taken the view that the appellant had failed to lay down the foundation of his case at the earliest reasonable opportunity during the prosecution's case. The appellant should not keep his defence in his sleeves. The I appellant's defence, in any case, was an afterthought and the trial judge was right in ruling that it had not raised any reasonable doubt against the prosecution's case. (para 49)

(5) On the facts and in the circumstances, there was no valid ground for this court to interfere with the sentence imposed on the appellant. (para 52)

Case(s) referred to:
Aber Raja Khima v. State of Saurashtra AIR [1956] 217 SC ***(refd)***
Ah Mee v. PP [1967] 1 LNS 3 FC ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Dominic Thomas v. PP [2009] 2 CLJ 477 HC ***(refd)***
Md Desa Hashim v. PP [1995] 4 CLJ 677 FC ***(refd)***
PP v. Hashim Hanafi [2003] 8 CLJ 555 HC ***(refd)***
PP v. Mohd Raif Mohd Lazim [2009] 1 LNS 1316 HC ***(refd)***
PP v. Tan Hock Beng [2002] 3 CLJ 177 HC ***(refd)***
Pulukuri Kotayya & Others v. Emperor (34) [1947] 67 ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 27, 91, 92, 114(g)
Firearms (Increased Penalties) Act 1971, ss. 2(1), 4
Internal Security Act 1960, s. 2
Penal Code, ss. 34, 392, 397, 411

For the appellant - G Ravishankar; M/s R Shankar, Ghandi & Assocs
For the respondent - Ridha Abdah Subri DPP

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Zamani Rahim JC:

The Charge

[1] Saw See Kean, OKT1 and Saw See Woi, OKT2 (hereinafter referred to as "the appellant") were jointly charged with an offence under s. 4 of Firearms (Increased Penalties) Act, 1971 read in conjunction with s. 34 of the Penal Code as follows:

> Bahawa kamu bersama-sama pada 3 Oktober 1999 jam lebih kurang 3.00 petang di kedai Poh Yeok Tukang Emas No. 28 Kerpan Ayer Hitam, dalam Daerah Kubang Pasu, di dalam Negeri Kedah, dalam mencapai niat bersama kamu berdua, telah dengan menunjukkan senjatapi, iaitu sepucuk pistol lambang bintang nombor siri 2003690566, dengan secara itu telah membuat orang yang bernama Thoo Yunn Keong ketakutan kematian. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah

A Seksyen 4 Akta Senjatapi (Penalti Lebih Berat atau Hukuman Lebih Berat) Akta No. 37 1971 dibaca bersama-sama dengan Seksyen 34 Kanun Keseksaan.

[2] The Firearms (Increased Penalties) Act, 1971 is hereinafter referred to as FIPA.

B

[3] Throughout the trial before the Sessions Court at Alor Star the prosecution called a total of 25 witnesses to support the charge. At the end of the prosecution's case, a *prima facie* case was held to be made out against the appellants as charged. The appellant's C defence was called. At the end of the defence case, the appellant was found guilty, convicted and sentenced to imprisonment for life and 10 strokes of whipping.

[4] Whilst the charge against Saw See Kean, OKT1 was duly amended to retaining stolen property under s. 411 of the Penal D Code. OKT1 had pleaded guilty thereto. He was convicted and sentenced to 18 months imprisonment with effect from the date of his arrest.

Prosecution Case

E **[5]** On 3 October 1999, at about 3.00 pm, one Thoo Yunn Keong, SP5 was in his goldsmith shop called Poh Yeok Tukang Emas, No. 28, Kerpan Ayer Hitam, Kubang Pasu, Kedah. At that time a male Chinese who wore a dark sunglasses with a frame coloured-reflection entered the shop. The male Chinese was F identified as the appellant. In the shop, the appellant approached and trained a pistol at SP5. The appellant directed SP5 to open the drawer where the jewelleries were kept, failing which the appellant threatened to shoot him to death.

G **[6]** SP5 complied with the appellant's request. He opened the jewelleries drawers. The appellant walked up to the said drawers, bent down and scooped the jewelleries therein with his right hand. His left hand was holding the pistol. While the appellant was busy scooping the jewelleries, SP5 braved himself by putting up a fight and managed to seize the pistol from the appellant's hand.

H

[7] The appellant was in SP5's shop for about five minutes.

[8] Having been disarmed, the robber (ie, the appellant), the appellant became panicky and ran to a waiting motorcar outside the I shop carrying the robbed jewelleries namely, 42 pieces of necklace and 16 pieces of bracelet, worth a total of RM50,000. The appellant managed to get into the motorcar bearing registration number PDH

2732. SP5 chased the appellant. He hurled the pistol which hit the rear windscreen of the said motorcar. The rear windscreen broke. The pistol had dropped in the motorcar.

[9] On the same evening, at about 7pm, the appellant went to Khor Peng Choon, SP9's house at Butterworth where he sold various types of necklaces and bracelets. The jewelleries weighed a total of 1,200 grammes. The price was RM 32,000. The appellant was initially paid a cash of RM 5,000 as deposit and the next day a further sum of RM10,000 by cheque. SP9 had melted the jewelleries into 10 gold bars, P20A - F and P21A - D. He sold gold bars weighing 800 grammes to one Tan Seng Chye, SP10 on 5 October 1999 at a price of RM28,000 on 5 October 1999.

[10] The appellant went to SP9's house with an unidentified woman in a dark Proton Iswara with a smashed rear windscreen.

[11] On 6 October 1999 at about 9pm, six gold bars, P20A - F weighing about 800 grammes were recovered by the police from SP10.

[12] Police investigation into this case led to the arrest of the appellant by DSP Khairi bin Ahrasa, SP12 at a telephone shop in Kangar on 5 October 1999 at about 7.15 pm. The Proton Iswara Aeroback bearing registration RE 1746 was also seized. The appellant was subsequently handed over to ASP Che Saari bin Ismail, SP19 from IPK Kedah.

[13] Following further investigation by SP19, the appellant led SP19 and a police party to a flat in Seberang Jaya, Butterworth. The main door of the flat was opened by OKT1. There was a Chinese lady named How Chia Siew in the flat together with OKT1. She was OKT1's girlfriend.

[14] Upon entering the said flat, the appellant led SP19 to an almeirah in a bedroom. There the appellant pulled a drawer of the almeirah and showed SP19 a pistol in a holster, P3 with a magazine and seven rounds of ammunition.

SP19 seized them together with two gold necklaces, P16 and P17, one each from OKT1 and his girlfriend, How Chia Siew.

[15] OKT1 and How Chia Siew were arrested.

[16] On 6 October 1999 at about 8.30am, the appellant led SP19 and his men to a roadside at Jalan Kampung Pochan, Jitra where the appellant took SP19 to a bush. In the bush, the following exhibits were strewn about. SP19 seized them as follows:

A 1) 6 pieces of a broken number plate - the alphabets being D, H, P and the figures were 2, 7 and 3, P40.

2) a number plate bearing registration number PDH 2732, P39.

3) a pair of sunglasses, its frame written with 'C 0053', P18.

B

4) a T-shirt brand "Rock 3 Eagle", size XL, P42.

5) a pair of white gloves, P44.

6) a pair of black jeans "US Devision", size 34 together with a C black belt, P46 and P47.

7) a pair of black/white Nike shoes, size 8, P49.

8) a pair of white socks brand "Henberg", P50A & B.

D 9) a yellow/white/black stripe T-shirt brand "Nanasing", size XL, P52.

10) 4 pieces of broken windscreen.

[17] Investigations revealed that the number plate of Proton Iswara E Aeroback bearing registration number PDH 2732 was false. Its genuine registration number was RE 1746. The Proton Iswara Aeroback RE 1746 was registered in the name of the appellant's mother, Ch'ng Lian Chang, SP23.

F **[18]** Both the appellant and OKT1 were brothers. They were charged with the offence as stated at the beginning of this judgment.

Grounds Of Appeal

G **[19]** There are no less than 35 grounds as listed in the petition of appeal. They are at times repetitious and overlap each other. For clarity purposes, I propose to deal and group them into the following captions, namely:

1) "Firearms" under s. 2(1) FIPA.

H

2) Identification evidence.

3) Section 27 Evidence Act.

4) The appellant's cautioned statement.

I

5) Miscellaneous.

6) Consideration of the defence.

"Firearm" Under s. 2(1) FIPA

[20] The learned counsel submitted that the pistol, P3 did not fall within the definition of "firearm" under FIPA. To appreciate the learned counsel contention, it is necessary to look at the definition of "firearm" in s. 2 of FIPA. On this issue, I have dealt it in the case of *Dominic Thomas v. PP* [2009] 2 CLJ 477 as follows:

> In the local case of *PP v. George Abraham* [1977] 1 LNS 93, the crucial point to be considered in this case was whether the starting pistol, Exhibit P2 used in sports event fall within the definition of "firearm" under s. 2 of the Internal Security Act 1960 ("ISA"). The scope of the definition of "firearm" in s. 2 of the ISA is wider than the definition of the "firearm" in s. 2 of the FIPA as the former definition classifies it under five limbs as follows:
>
> "firearms" means:
>
> (i) any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged; or
>
> (ii) which can be adapted for the discharge of any such shot, bullet or other missile; and
>
> (iii) any weapon of whatever description designed; or
>
> (iv) adapted for the discharge of any noxious liquid, gas or other thing;
>
> (v) includes any component part of any such weapon as aforesaid.

Syed Agil Barakbah J said the question whether an article comes within this definition is a question of fact to be decided in each individual case and in approaching the question in particular purpose for which the article is designed and manufactured has to be taken into consideration. No formula can be devised to cover all possible sets of circumstances. Having regard to the evidence of the armament officer, PW1, His Lordship said at p 81:

> considering Exhibit P2 as it is, I do not think it falls within the first and third limbs of the definition of "firearm".

[21] His Lordship went on to conclude at the end of his judgment at p. 82 as follows:

> I do not consider the starting pistol (Exhibit P2) to be a "firearm" as defined in s. 2 of the Act.

[22] In this case, ASP Omar bin Zakaria, SP1 was an armament officer attached at Kedah Police Contingent. He had been in the field of armament for about 14 years. He had attended several courses on firearms and ammunitions at Maktab Teknik Polis, Kuala Lumpur in 1986. Not only that, SP1 was also trained on matters of handling firearms including forensic ballistics.

[23] On 23 October 1999, SP1 received a pistol, its magazine and seven rounds of ammunitions in envelopes marked A, B and C respectively from Insp. Ramalingam a/l Kannan, SP25. SP25 had examined the pistol, P3, the magazine, P5 and 7 rounds of live ammunition, P7 and found their mechanism were in working order and SP1 test-fired P3 using P5 and P7 to ascertain its serviceability. Based on the test-fire, SP1 opined that P3, P5 and P7 were all in serviceable condition. SP1's evidence ran as follows:

> Pada hari itu 3 sampul itu (A, B dan C) mengandungi barang-barang kes iaitu sepucuk pistol, satu unit magezin dan 7 butir peluru. Berikutnya setelah mengenalpasti eksibit tersebut pada pistol saya telah memeriksanya dan saya dapati pistol berkenaan cukup lengkap dan sempurna. Begitu juga barang kes (C) iaitu 7 butir peluru, didapati kesemuanya cukup lengkap dan sempurna, dengan istilah lain "life complete round".
>
> Seterusnya saya telah buat ujian fungsi ke atas ketiga-tiga eksibit tadi. Pistol itu saya uji dengan menggunakan magezin yang disahkan mengisi peluru dari sampul C; didapati tujuh butir peluru itu sesuai dengan magazine.
>
> Keputusannya pistol dapat berfungsi dengan baik begitu juga peluru dan magazine. Ini berdasarkan kepada ujian tembakan.

[24] Based on the aforesaid evidence of SP1, the learned trial judge was satisfied with the grounds upon which SP1 based his opinion on the serviceability of P3 and P7. SP1 had accepted his evidence as an expert on firearm. On the definition of s. 2 of FIPA, the learned trial judge said:

> Dari takrifan di atas, saya berpuas hati ia adalah jelas bahawa pistol yang dimaksudkan di dalam pertuduhan adalah termasuk di bawah takrifan ini.

[25] In other words, the learned trial judge was of the view that "sepucuk pistol lambang bintang nombor siri 2003690566", the subject matter of the charge, falls within the definition of s. 2 of FIPA.

[26] The learned counsel's argument on this issue has no merit. A

Identification Evidence

[27] The learned counsel submitted that the identity of the Appellant who wore sunglasses entered SP5's goldsmith shop, trained the pistol at him and carted away the jewelleries was not B proven. The evidence showed that the appellant was identified by SP5 in an identification parade held by C/Insp. Beng Hui a/l Lakim, SP15 on 11 October 1999. The parade was properly and fairly conducted. There were altogether 11 participants in the parade (including OKT1). All of them, including the appellant were made C to put on the sunglasses. The appellant put on the sunglasses, P18. The appellant was given the choice to pick his position in the parade. He positioned himself between participants No. 4 and No. 5. SP5 inspected the parade and he identified the appellant by touching his body. Upon touching the appellant, SP5 informed D SP15 that:

> ... lelaki yang dia cam ini (ie, the Appellant) merompak kedainya dan merampas pistol daripadanya dan dia juga membaling kereta saspek.

The evidence showed that the rear windscreen of the motorcar E which was hit by the pistol, P3 was broken.

[28] The second witness was Ng Poh Seng. Before he entered the room where the parade was held, the appellant was given the liberty to pick his position in the parade. The appellant positioned himself between participants No. 3 and No. 4. He wore the same clothes. F This time around the appellant did not put on the sunglasses. Ng Poh Seng did not identify the appellant.

[29] The next witness was Hing Ah Seng, SP8. He worked as a welder of motorcars at a workshop in Jalan Siram, Butterworth. The G appellant came to the workshop in a Proton Iswara Aeroback motorcar which was dark in colour but he could not remember its registration number. The rear windscreen of the motorcar was smashed up. SP8 had replaced and fixed a new rear windscreen to the motorcar. It took approximately one hour for him to complete H fixing the new rear windscreen.

[30] SP8 attended the parade and he picked the appellant in the parade and told SP15 that "... bahawa lelaki itu (ie, the appellant) telah pergi repair cermin matanya di kedainya" (at p. 122 of the Appeal Record). Obviously the identification of the Appellant by I SP8 as a person who came to his shop to repair "cermin matanya" is incorrect. It should read SP8 identified the appellant as the

person who came to his shop to have the broken rear windscreen of motorcar shown in photographs P19A, B and C be replaced and fixed with a new one. (see SP8's evidence at pp. 82, 83 and 84 of the Appeal Record).

[31] Next SP15 went to the Jitra Police Station where firstly, he conducted the identification of the sunglasses, P18. He arranged 10 similar sunglasses in two rows (see photograph, P10A at p. 358 of Appeal Record). He placed P18 in position No. 2. This arrangement was made in the presence of the appellant. SP5 was brought into the room and requested him to identify the sunglasses worn by the appellant on the day of the robbery. SP5 inspected the sunglasses and picked out P18 and identified it as 'cermin mata yang dipakai saspek (ie, the appellant) semasa kejadian samun itu berlaku di kedai dia' (p. 123 of Record of Appeal).

[32] Thereafter SP15 conducted the identification of the pistol, P3. There were ten pistols of various models arranged on the floor and P3 was placed in position No. 10 (see photograph, P10B at p 358 of appeal Record). This arrangement was made and observed by the appellant. SP5 was called to the room. He viewed the firearms and he took out P3 and identified it as the pistol exhibited by the appellant to put him in fear of death during the robbery. He identified the said pistol based on the symbol "Star" on the butt of the pistol.

[33] Thus, the learned counsel's complaint on the issue of identification of the appellant, the sunglasses, P18 and the pistol, P3 were devoid of merit.

Section 27 Evidence Act

[34] As regard the application of s. 27 of the Evidence Act, the learned counsel contended that a trial-within-trial should be conducted to determine its voluntariness. At pp. 38, 39 and 40 of the Appeal Record this is how the trial judge deals with it.

> Jika peguambela masih menghujahkan tertuduh kedua telah memberikan maklumat itu secara tidak sukarela kepada SP19, penghujahan itu tidak relevan. Seksyen 27 Akta Keterangan 1950 tidak memerlukan kesukarelaan pemberi maklumat dibuktikan terlebih dahulu sebelum maklumat itu boleh diterima masuk. Lagipun SP19 dalam keterangannya dan setelah disoal balas, membuktikan tidak ada unsur-unsur paksaan, dorongan, janji, ugutan atau memberi ketakutan yang menyebabkan tertuduh kedua memberikan maklumat itu secara tidak sukarela. Dari keterangan yang ada jelas tidak ada bukti yang menunjukkan tertuduh kedua telah memberi maklumat secara tidak sukarela.

Kepentingan peruntukan seksyen 27 Akta Keterangan 1950 ialah mengenai maklumat yang diberi oleh tertuduh kedua pada SP19 sehingga membawa pada terjumpanya barang-barang yang dinyatakan itu. Terjumpanya barang-barang yang dinyatakan di dalam maklumat itu menunjukkan kebenaran maklumat yang diberi oleh tertuduh kedua. Di bawah seksyen 27 Akta Keterangan, kesukarelaan bukanlah sesuatu yang perlu dibuktikan terlebih dahulu. Peruntukan seksyen 27 ini berdiri sendiri dan tidak tertakluk pada peruntukan seksyen 24, 25 dan 26 Akta yang sama. Ia juga tidak berkaitan dan tertakluk pada percakapan amaran di bawah seksyen 113 Kanun Prosedur Jenayah.

Di dalam kes *Wai Chan Leong v. PP* [1989] 2 CLJ 1168; [1989] 1 CLJ (Rep) 171 diputuskan dalam Held No. 1, 2 dan 3 bahawa seksyen 27 Akta Keterangan berdiri sendiri dan tidak tertakluk kepada peruntukan seksyen 113 Kanun Prosedur Jenayah dan juga peruntukan seksyen 24, 25 dan 26 Akta Keterangan.

Di dalam kes yang sama Held No. 4 diputuskan:

Perkataan 'information' di bawah seksyen 27 Akta Keterangan tidak seperti satu kenyataan (statement) seperti yang terdapat dalam seksyen 113 Kanun Prosedur Jenayah atau 37A(2) Akta Dadah Berbahaya 1952 adalah termasuk pengetahuan yang diperolehi oleh orang yang diberikan maklumat oleh tertuduh dan juga termasuk cara-cara untuk mendapatkan pengetahuan tersebut.

Di dalam kes itu, selepas perayu disoalsiasat dia telah memberikan maklumat kepada Insp. Mohamed Yusof iaitu, "Saya ada simpan lagi 'pek hoon' dalam rumah saya sewa punya - Taman Midah - boleh tunjuk sekarang." Maklumat itu diterima masuk di bawah seksyen 27 Akta Keterangan.

[35] The learned trial judge went to say at pp. 41 and 42 of the Appeal Record as follows:

Hujahan yang menyatakan peruntukan undang-undang memperuntukkan kenyataan seseorang yang ditangkap hanya boleh diterima masuk setelah amaran yang diberikan adalah tidak tepat. Di dalam kes ini apa yang dikatakan oleh tertuduh kedua kepada SP19 adalah maklumat (information) yang diperuntukkan di bawah seksyen 27 Akta Keterangan dan bukannya kenyataan (statement) atau percakapan amaran di bawah seksyen 113 Kanun Prosedur Jenayah. Terdapat perbezaan antara maklumat dan kenyataan. Terdapat perbezaan antara kehendak seksyen 27 Akta Keterangan dan seksyen 113 Kanun Prosedur Jenayah. Maklumat di bawah seksyen 27 tidak perlu dibuktikan unsur kesukarelaan terlebih dahulu berbanding dengan seksyen 113 Kanun Prosedur Jenayah. Kes *Wai Chan Leong v. PP* (dirujuk di atas).

A Memandangkan apa yang dikatakan oleh tertuduh kedua kepada SP19 tergolong di bawah maklumat seksyen 27 Akta Keterangan tidak timbul isu amaran diberikan sebelum atau selepas maklumat itu diberikan. Malahan dalam keadaan ini amaran tidak perlu diberikan oleh SP19 kepada tertuduh kedua.

B Dengan kata lain, peruntukan seksyen 27 ini membenarkan kemasukan maklumat yang diberi oleh tertuduh kedua yang membawa pada terjumpanya sesuatu fakta tanpa mengira sama ada maklumat itu termasuk pengakuan bersalah atau tidak. Di dalam kes ini, hasil maklumat oleh tertuduh kedua kepada SP19, barang kes P3, P18, P39, P40 telah diperolehi oleh SP19. Selain dari itu, barang kes yang
C berkaitan dengan kes ini iaitu P16, satu utas rantai leher yang dirampas dari tertuduh pertama telah diperolehi oleh SP19 hasil maklumat itu juga. P16 dan P17 dicamkan oleh SP5 sebagai rantai dari kedai emasnya yang telah dirompak.

[36] The learned counsel argued that the information given by the
D appellant, that is; "Pistol (yang saya pakai dalam samun di Kerpan) saya simpan di rumah abang saya di Flat, Tingkat 3, di Butterworth, plate kereta, baju hitam dan cermin mata saya buang di jalan menghala ke Lebuhraya Changloon. Saya boleh tunjuk tempat pada Encik" (see P69 and P70A), which led to the discovery
E of the pistol, P3, the magazine, P5 and 7 rounds of ammunations, P7, should not have been admitted as s. 27 of the Evidence Act was inapplicable. Having scrutinised the above quoted information the words "yang saya pakai dalam samun di Kerpan" stand inadmissible as the words "with which I stabbed A" in the *locus*
F *classicus* case of *Pulukuri Kotayya & Others v. Emperor* (34) [1947] 67, because the words "yang saya pakai dalam samun di Kerpan" do not relate to the discovery of the pistol in the drawer of the almeirah in the bedroom in OKT1's flat at Butterworth. The evidence to fasten the pistol, P3 with the robbery in SP5's
G goldsmith shop must be sought elsewhere. In this case, the evidence of SP5 showed that he positively identified P3 as the pistol used by the appellant to threaten and put him in fear of death in the course of the robbery at his shop. Thus, the main ingredient of the offence under s. 4 of FIPA has been proved.

H **[37]** Another aspect of s. 27 argued by the learned counsel was that ASP Saari bin Ismail, SP19 who discovered P3, P5 and P7 at the instance of the appellant, already knew the existence of the firearm used in the robbery which was reported *vide* Ayer Hitam Rpt. No. 742/99.

I **[38]** On the issue that the police had prior knowledge of the fact discovered, I have dealt with similar point in my decision in *PP v. Mohd Raif Mohd Lazim* [2009] 1 LNS 1316 (Kedah Criminal Trial

No. 45-11-2004), where I have referred to the case of *PP v. Hashim Hanafi* [2003] 8 CLJ 555 where Augustine Paul JCA (as he then was) said:

> If the police have prior knowledge of the information supplied by the accused, obviously the subsequent discovery will be based on such prior knowledge and not on that of the accused. It will thus render the information supplied by the accused inadmissible as it will not be the cause of the discovery. It must be remembered that s. 27 is based on the view that if a fact is actually discovered in consequence of information given some guarantee is afforded thereby that the information is true, and accordingly can be safely allowed to be given in evidence (see *Pulukuri Kotayya & Ors*). It follows that prior knowledge which will make s. 27 inapplicable must be of such a nature that it must be capable on its own of leading to the discovery of the object. If it does not have that effect then the cause of the discovery will still be the information supplied by the accused and not the prior knowledge of the police. In that event, the information supplied by the accused will be inadmissible as the information that the police have will not amount to prior knowledge. The corollary is that information that the accused has drugs or has hidden the drugs without any further information on their exact location will not amount to prior knowledge. In support, I refer to *Md Desa Hashim v. PP* [1995] 4 CLJ 677 where Gopal Sri Ram JCA said at p. 687:
>
> > If an investigating agency has prior knowledge of the whereabouts of the article that is recovered, then the section does not apply.
> >
> > The 'whereabouts' of an article is a reference to its exact place of location. In further support, I refer to the Indian Supreme Court case of *Aber Raja Khima v. State of Saurashtra* AIR [1956] SC 217 where it was held that discovery of hidden incriminating articles said to be have been recovered by the accused is inadmissible if the police already knew they were hidden ...

[39] On the facts in the instant case, certainly ASP Saari bin Ismail, SP19 did not know the exact location of the pistol, P3, the magazine, P5 and the ammunitions, P7. At best, SP19 only knew the firearm was used in the robbery at SP5's goldsmith shop which was reported *vide* Ayer Hitam Rpt. No. 742/99. SP9 had a cursory knowledge only about the firearm and not its specific location. Therefore, this case is one of the discovery of P3, P5 and P7 which SP19 or other police personnel have no prior knowledge of their whereabouts. Section 27 of the Evidence Act, is, therefore applicable.

[40] Having dealt with the evidence relating to s. 27 at some length, the learned trial judge admitted the information given by the appellant to SP19 which led to the discovery of the pistol, P3, the magazine, P5 and 7 rounds of ammunition, P7.

[41] There are no detectable errors in law and facts by the trial judge in considering s. 27 in this case. The learned counsel's argument in this aspect of the case is without substance.

The Appellant's Cautioned Statement

[42] The learned counsel went on to attack the appellant's cautioned statement. The cautioned statement should be rejected, argued the learned counsel on the grounds of oppression and breached of the Lock-Up Rules. According the learned trial judge, based on witnesses' testimonies in the *voire dire* and their cross examination by the learned counsel, the trial judge found that the appellant's allegation of involuntariness was an afterthought. The learned trial judge, therefore, admitted the appellant's cautioned statement after a trial-within-trial and marked as P74. This is how the learned trial judge put in his judgment:

> Berdasarkan kepada keterangan-keterangan saksi di dalam TWT tidak terdapat apa-apa pembuktian terhadap dakwaan tertuduh kedua itu, perkara-perkara yang dinyatakan tertuduh kedua (Perayu) itu. Cuma di dalam TWT sahaja, maka saya bersetuju dengan pendakwaan bahawa perkara-perkara ini adalah "afterthought evidence" dan dengan itu saya telah menerima ID74 itu sebagai keterangan dan ditandakan sebagai Eksibit P74.

[43] P74 was authenticated by the appellant by affixing his signature in Chinese characters on every page of the statement.

[44] The learned counsel's argument on the admissibility of P74 also failed.

[45] The cautioned statement, P74 is annexed to this judgment as "Annexure A".

Miscellaneous

[46] Other unsatisfactory features raised by the learned counsel may be summarised as follows:

a) There was a break in the identity of the pistol, P3. SP5 said the pistol was brown in colour, whilst SP1 said it was black. As to serial numbers on the pistol, both SP1 and Insp. Beng Hui a/l Lakim, SP15 said they were 20036905. Whereas the armament officer's report stated 200369056.

b) The pistol, P3 was recovered in a drawer amongst lady's clothes in a flat at Butterworth. The lady was arrested at the said flat but she was not called as a prosecution witnesses. Thus an adverse inference under s. 114(g) has been raised against the prosecution: see *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 and *PP v. Tan Hock Beng* [2002] 3 CLJ 177.

c) In his testimony, SP5 said that he identified the pistol, P3 because it had the "Star" symbol, whilst in police report, P15 there was no mention of the "Star" sign on P3. Therefore, SP5's evidence on the identification of P3 should be rejected as it amounts to adding or varying his police report, P15 which is contrary to ss. 91 and 92 of the Evidence Act: see *Ah Mee v. PP* [1967] 1 LNS 3. The learned counsel also admitted that the trial judge had erred in failing to conclude that there were contradictions in the testimony of ASP Saari bin Ismail, SP19 and his police report, thus ss. 91 and 92 are applicable.

d) The learned trial judge had failed to make judicial appreciation of the application of the Lock-Up Rules as the Appellant was already placed under arrest and his interrogation was in breach of the said Rules.

e) The learned trial judge had failed to consider or referred to s. 34 of the Penal Code: see *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 but no averment of this ground was ever made in the petition of appeal.

[47] The above contentions had in no way weakened the prosecution's case against the appellant as charged.

[48] Based on the foregoing grounds, contrary to the learned counsel's argument, upon maximum evaluation of the prosecution evidence, the prosecution has succeeded in establishing a *prima facie* case against the Appellant. The appellant's defence was rightly called for an offence under s. 4 of FIPA.

Consideration Of The Defence

[49] In his defence, the appellant gave his evidence on oath. He was the sole witness for the defence. In considering the defence case, the trial judge took the view that the appellant had failed to lay down the foundation of his case at the earliest reasonable opportunity during the prosecution's case. He should not keep his defence up in his sleeves so to speak: see *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705. Therefore, the appellant's defence was an afterthought or recent invention. The learned trial judge wrote as follows:

A Walau bagaimanapun, di dalam kes kita ini, kebanyakan keterangan pembelaan yang dikemukakan tidak diasaskan semasa saksi-saksi pendakwa memberi keterangan mereka. Oleh itu jelaslah bahawa pembelaan tertuduh kedua ini (perayu) merupakan pembelaan yang direka selepas tertuduh mendengar versi keterangan pendakwa. Jika sekiranya apa yang dinyatakan oleh tertuduh kedua (perayu) di
B peringkat pembelaan adalah cerita yang sebenarnya, sudah tentu fakta-fakta tersebut akan ditimbulkan dan di "established" pada peringkat saksi-saksi pendakwaan memberikan keterangan mereka. Fakta-fakta itu akan dicadangkan pada saksi-saksi berkenaan. Ini telah gagal dilakukan oleh tertuduh kedua (perayu) melalui peguambelanya yang bijaksana. Kegagalan ini menunjukkan bahawa keterangan pembelaan tertuduh
C kedua (perayu) adalah sesuatu yang tidak munasabah dan tidak menimbulkan keraguan ke atas kes pendakwa yang tidak dicabar.

[50] However, the learned trial judge conceded that he had wrongly invoked s. 114(g) of the Evidence Act 1950 against the appellant
D but that did not detract from the fact that the prosecution had adduced overwhelming evidence against the appellant.

[51] In his final attempt to mitigate the imprisonment for life imposed on the appellant, the learned counsel urged me to reduce the charge to one of armed robbery under ss. 392 and 397 of the
E Penal Code as the charge against OKT1 was amended to retaining stolen property under s. 411 of the Penal Code.

[52] Having read and re-read the grounds of judgment of the learned trial judge, I find no valid ground for me to interfere with
F the sentence imposed on the appellant.

[53] I, therefore, accordingly dismissed the appellant's appeal on conviction and sentence. I hereby affirmed the decision of the learned trial judge.

G **"Annexure A"**

At the beginning of P74, the appellant is personal particulars were taken by the regarding officer, ASP Wong Chong Fooi, TWT3 followed by the administration of a caution under s. 113 Criminal Procedure Code. The caution reads:

H Adalah menjadi kewajipan saya memberi amaran kepada kamu, bahawa kamu tidak diwajibkan berkata apa-apa atau menjawab apa-apa soalan, tetapi apa juga yang kamu katakan sama ada sebagai jawapan kepada suatu soalan atau tidak, boleh diberi sebagai keterangan.

I T.T (in Chinese characters) T.T

The Appellant Pegawai Perakam

The appellant understood the caution. There was also no inducement, threat and promise made or appeared to have been made against the appellant. P74 reads *inter alia*:

S: Apa yang kamu hendak cakapkan?

J: Pada 3 Oktober 1999 jam lebih kurang 12.00 tengah hari, semasa saya berada di rumah, saya telah jumpa abang saya bernama Saw See Kean dan memberitahu beliau mahu pergi pinjam wang dari 'Along', iaitu peminjam wang tanpa lesen. Saya minta Saw See Kean menemani saya pergi dan pergi bersama. Beliau ada tanya saya mahu pergi mana pinjam dan saya memberitahu dia dekat Sanglang. Beliau setuju pergi dengan saya. Dengan itu saya pun memandu motorkar kepunyaan ibu saya nama Ch'ng Lian Chong jenis motorkar Proton Iswara No. RE 1746, warna kelabu dengan membawa abang saya menuju ke Sanglang. Apabila lepas Sanglang, saya telah bawa motorkar masuk ke sebatang jalan kecil dan berhenti di tepi jalan saya buka boot motorkar dan keluarkan sepasang No. Plat palsu No. PDH 2732 yang saya sediakan dalam boot motorkar. Saya pun pasang No. Plat palsu PDH 2732 ke atas depan dan belakang motorkar. Abang saya tanya saya kenapa tukar No. Plat dan saya memberitahu dia demi mengelakkan 'Along' kenal no. asal motorkar. Selepas tukar nombor plat, saya telah suruh abang saya memandu motorkar. Saya telah suruh tunjuk jalan kepada abang saya sehingga kami sampai dekat satu kedai emas di Kerpan Ayer Hitam. Saya suruh abang saya tunggu dalam motorkar dan saya sendiri berjalan kaki masuk ke kedai emas itu. Saya tidak tahu nama kedai emas itu. Apabila saya masuk ke dalam kedai emas itu saya terus keluarkan pistol yang diisi dengan 7 butir peluru dan acu kepada lelaki Cina tersebut dan dalam bahasa Hokkein saya cakap "Samun, buka laci". Lelaki Cina itu terus buka laci showcase barang kemas dan saya pun masukkan tangan kanan saya untuk ambil barang-barang kemas dan masukkan barang kemas dalam satu beg hitam (illegible) yang saya bawa bersama. Pada masa yang samun, tangan kiri saya pegang pistol. Tiba-tiba lelaki Cina itu telah rampas pistol dari tangan saya. Lelaki Cina itu cuba tembak saya dengan pistol tapi tidak meletup. Seterusnya saya ambil kerusi kayu dalam kedai emas dan baling ke arah kaunter dan terus berlari menuju ke tempat motorkar di mana abang saya sedang menunggu saya maklum abang saya bahawa orang mahu pukul saya dan suruh beliau cepat edar. Semasa kami berdua dalam motorkar dan hendak beredar dari situ, saya dengar cermin belakang motorkar pecah dibaling dengan sesuatu oleh lelaki Cina itu. Saya suruh abang saya cepat bawa motorkar lari dari situ. Apabila kami sampai di pertengahan jalan ke Changloon, saya telah suruh abang saya bawa motorkar masuk ke sebatang jalan kecil. Kami berhenti motorkar di situ. Di situ saya telah sendiri pasang balik No. plat yang asal, lepas itu saya buang No. Plat yang palsu. Saya buang No. plat palsu itu dalam semak. Barang kemas samun itu, saya juga buang baju T warna hitam, satu helai

jean warna hitam, sepasang kasut jenis Nike. Baju, seluar dan kasut tersebut adalah dipakai oleh saya semasa saya lakukan samun. Saya juga ada buang sehelai baju yang dipakai oleh abang saya. Saya juga ada buang 4 pasang stoking warna putih yang saya pakai di sana. Selepas kami salin pakaian, saya juga telah buang cermin belakang motorkar yang telah pecah dan sepasang cermin gelap yang saya pakai semasa melakukan samun. Semasa saya bersihkan kaca-kaca dalam motorkar, saya telah jumpa pistol yang telah saya gunakan semasa melakukan samun. Pistol itu berada di tempat letak kaki di bahagian belakang motorkar. Barulah saya sedar bahawa lelaki Cina dalam kedai emas telah baling cermin belakang motorkar kami dengan pistol yang dia telah rampas dari saya pada awalnya. Saya cepat-cepat simpan pistol itu dalam beg hitam sama barang kemas yang telah saya samun untuk elak dilihat oleh abang saya. Lepas itu saya ambil alih sebagai pemandu dan saya telah bawa abang saya terus ke Seberang Jaya, Butterworth. Saya tinggalkan abang saya dan suruh dia sendiri balik. Lepas itu saya terus pergi jumpa kawan saya bernama Ah Choon di Butterworth. Saya sampai di rumah Ah Choon pada jam lebih kurang 6 petang pada 3 Oktober 1999. Masa saya sampai di rumah Ah Choon, Ah Choon seorang sahaja di dalam rumah. Saya pun jualkan barang-barang kemas yang saya samun kepada Ah Choon. Saya ada nampak Ah Choon timbang barang-barang kemas dan dapati beratnya ialah 1.206kg. Ah Choon tawarkan RM 26,000 dan saya setuju. Ah Choon bayar wang pendahuluan sebanyak RM 5,000 dan bakinya akan dibayar kemudian. Pada masa itu saya juga ada hutang Ah Choon RM 10,000. Pada 4 Oktober 1999 jam lebih kurang 4.30pm Ah Choon bayar lagi RM 6,000 kepada saya di rumah Ah Choon. Wang keseluruhan masih belum dijelaskan oleh Ah Choon. Saya tidak jual semua barang kemas kepada Ah Choon tetapi ada ambil 4 rantai leher emas. Satu rantai leher saya hadiahkan kepada abang saya Saw See Kean, saya rantai leher emas saya hadiahkan kepada teman wanita Saw See Kean nama Ah Siew. Satu rantai leher emas saya hadiahkan kepada teman wanita saya bernama Ah Girl dan saya rantai emas leher saya pakai sendiri.

Pada 5 Oktober 1999 jam lebih kurang 8 malam, saya telah ditangkap di kedai telefon di Kangar. Semasa ditangkap, polis juga telah rampas motorkar RE 1746 daripada saya.

Saya mengaku melakukan kes samun ini dan pada awal pagi 6 Oktober 1999 saya telah bawa Tuan Saari dan sepasukan polis pergi ke rumah abang saya bernama Saw See Kean di Flat F di Seberang Jaya Butterworth dan tunjukkan kepada Tuan Saari di mana saya simpan pistol dan peluru, iaitu dalam locker di dalam bilik tidur utama Flat tersebut. Saya telah serah pistol dan magazin serta 7 butir peluru kepada Tuan Saari.

Pada 6 Oktober 1999 jam lebih kurang 8.30 pagi saya telah bawa Tuan Saari dan sepasukan polis ke satu tempat di antara Kerpan ke Changloon di mana saya telah tunjuk kepada Tuan Saari tempat yang saya buang No. Plat palsu PDH 2732, baju, seluar, stoking, kasut, cermin belakang motorkar RE 1746 yang pecah, cermin mata hitam dan sarung tangan. Barang-barang tersebut telah diambil oleh polis.

Pada 6 Oktober 1999 jam lebih kurang 8.00 malam saya telah membantu pihak polis untuk mengesan dan menangkap Ah Choon di Sungai Dua, Butterworth.

S: Di mana kamu perolehi pistol dan peluru tersebut?

J: Saya pinjam dengan bayaran RM 5,000 dari kawan saya bernama Ah Oon di Johor Bahru untuk tempoh satu bulan.

S: Bila kamu pinjam pistol dari Ah Oon?

J: Pada awal bulan September 1999 di tempat letak kereta Holiday Inn, Johor Bahru.

S: Adakah kamu tahu jenis dan nama pistol itu?

J: Saya tidak tahu.

S: Sebelum kamu lakukan samun kedai emas tersebut, pernahkah kamu buat pemerhatian di kedai emas itu?

J: Saya pernah buat pemerhatian satu kali 2 hari sebelum kejadian.

S: Adakah abang kamu tahu tentang rancangan kamu untuk melakukan samun ke atas kedai emas itu?

J: Abang saya tidak tahu.

S: Adakah abang kamu Saw See Kean tahu kamu memiliki pistol dan peluru?

J: Beliau tidak tahu.

S: Adakah kamu bersama Saw See Kean sama-sama merancang kes samun ini?

J: Tidak. Ini rancangan saya sendiri tanpa pengetahuan abang saya.

S: Di mana kamu buat No. Plat palsu No. PDH 2732?

J: Saya buat di sebuah kedai aksesori di Jitra.

S: Adakah Saw See Kean dapat nampak kamu lakukan samun di mana dia tunggu dalam motorkar semasa kejadian samun?

J: Tidak boleh nampak.

S: Adakah Ah Choon tahu barang kemas yang kamu jual kepadanya itu adalah barang kemas hasil samun?

J: Beliau tidak tahu.

S: Adakah kamu ada memberitahu Ah Choon bahawa barang kemas itu diperolehi dari perbuatan samun?

J: Tidak ada.

(Percakapan tersebut di atas telah dibaca balik kepada Saw See Wooi dengan diterjemahkan dalam Bahasa Hokkien oleh ASP Wong Chong Fooi dan akui percakapan yang benar dan betul oleh Saw See Wooi)

S: Adakah kamu ingin tambah atau pinda percakapan kamu?

J: Tidak.

T.T Perayu (in Chinese characters)

Di hadapan saya
t.t
(Wong Chong Fooi) ASP
8.10.1999 jam 1310